

April 23, 2020

VIA EMAIL: paula.wilson@deq.idaho.gov
Paula Wilson
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706

Re: Docket No. 58-0125-2001 (IPDES Negotiated Rulemaking)

Dear Paula:

These comments are submitted on behalf of Aberdeen-Springfield Canal Company ("ASCC") regarding the above-referenced negotiated rulemaking being conducted by the Idaho Department of Environmental Quality ("DEQ").

ASCC is the oldest Carey Act Canal Company in the State of Idaho and delivers irrigation water supplies to approximately 62,000 acres of agricultural land in Bingham and Power Counties, utilizing its natural flow water right from the Snake River and storage water from American Falls, Palisades and Jackson Lake Reservoirs. To facilitate its irrigation water delivery and drainage activities, ASCC selectively applies aquatic herbicides to its canals and drains, in combination with mechanical cleaning. ASCC has been conducting these activities in one form or another for over 100 years to keep its irrigation water flowing.

ASCC appreciated the opportunity to review DEQ's Preliminary Draft Rule No. 1 and Discussion Paper #1 (April 2020) and to participate in the negotiated rulemaking meeting held by DEQ via telephone and web conferencing on April 14, 2020, including the questions that were asked during the meeting.

ASCC supports the definitional clarification that "pesticide discharges" do not include, or in any way modify, the irrigation return flow exemption in the Clean Water Act, as contained in 33 U.S.C. 1342(l) and 33 U.S.C. 1362(14). IDAPA 58.01.25.10.xx (proposed definition of "Pesticide Discharges"). We understand that the proposed addition of this definition is prompted by recent changes to the federal National Pollutant Discharge Elimination System ("NPDES") permitting regulations and the need for conformance in DEQ's Rules Regulating the Idaho Pollutant Discharge Elimination System ("IPDES") Program, IDAPA 58.01.25 ("IPDES Rules"). We would like to highlight two examples of additional legal authority supporting this

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definitional interpretation of the irrigation return flow exemption as it relates to pesticide discharges.

First, a recent Ninth Circuit Court of Appeals decision clarifies that the irrigation return flow exemption broadly includes all discharges related to crop production. Clearly, the use of aquatic herbicides by irrigated agriculture is related to crop production and therefore falls within the scope of the exemption. A copy of this Ninth Circuit opinion is available at <https://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/20/17-17130.pdf>. This federal court decision provides further legal support for the definition of “pesticide discharges” being proposed for addition to DEQ’s IPDES Rules.

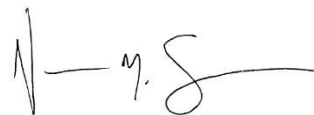
In addition, previously issued guidance by the U.S. Environmental Protection Agency (“EPA”) suggests that the use and discharge of aquatic herbicides and residue by irrigated agriculture (i.e., in irrigation drains and canals) fall under the irrigation return flow exemption. A copy of EPA’s guidance is available at <https://www3.epa.gov/npdes/pubs/talentfinal.pdf>. The EPA guidance provides additional support for the definition of “pesticide discharges” as contained in DEQ’s proposed rule.

ASCC has chosen to file Notices of Intent and Annual Reports with EPA, pursuant to the Pesticide General Permits issued in 2011 and 2016. We understand that DEQ plans to issue a new Pesticide General Permit in 2021. We support the existing \$0 fee for the Pesticide General Permit, consistent with the existing DEQ rationale for charging no fee for the permit and the Idaho State Legislature’s previous approval of the IPDES fee structure. We see no reason to change it.

We appreciate your consideration of these comments in support of DEQ’s proposed rule changes.

Sincerely,

PARSONS BEHLE & LATIMER

A handwritten signature in black ink, appearing to read "N. Semanko", with a stylized flourish at the end.

Norman M. Semanko
Attorney at Law

NMS:pw

cc: Steve Howser, Aberdeen-Springfield Canal Company (via email)
Paul Arrington, Idaho Water Users Association (via email)